

[REDACTED] **ORIGINAL**
RECEIVED
JUL 12 1996
Federal Communications Commission
Office of Secretary

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)
)
Amendment to the Commission's) WT Docket No. 95-157
Rules Regarding a Plan for Sharing)
The Costs of Microwave Relocation)

To: The Commission

DOCKET FILE COPY ORIGINAL

PETITION FOR RECONSIDERATION
OF
AMERICAN PETROLEUM INSTITUTE

AMERICAN PETROLEUM INSTITUTE

Wayne V. Black
John Reardon
Keller and Heckman, LLP
1001 G Street
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Dated: July 12, 1996

049

TABLE OF CONTENTS

	Page
SUMMARY	ii
I. PETITION FOR RECONSIDERATION	1
A. Conditions for Reimbursement	2
B. Cost Estimates	5
C. Sunset Provision	5
D. Comparable Facilities	6
E. Transaction Expenses	8
F. One Year Trial Period	9
G. Costs of Operating on a Transitional Basis	10
II. CONCLUSION	12

SUMMARY

The American Petroleum Institute ("API") supports the Federal Communications Commission's ("Commission") decision to allow cost sharing among PCS licensees. API believes that the Commission should fine tune its cost-sharing rules, however, so that adjacent channel interference is included in the cost-sharing plan. In addition, API requests the Commission not to require cost estimates during the voluntary negotiation period because an incumbent should remain free from obligation during this time.

API believes that the Commission's sunset provision will provide a disincentive for PCS licensee to relocate microwave incumbents as that date approaches. API urges the Commission to rescind this counterproductive deadline. API also opposes the Commission's definition of throughput because it will result in replacement systems with lower capacity than existing systems

API urges the Commission to recognize that transaction expenses will be an integral part of most relocations. These transaction expenses should be reimbursed by the PCS licensee, up to a reasonable amount, regardless of when relocation occurs.

The Commission should proactively apply its new policy that requires stipulation of the one year trial period in the relocation contract. Otherwise, parties that contracted in reliance upon the Commission's previous policy would have their agreements unfairly impacted by this new policy.

Finally, the Commission should permit incumbents to recover the reasonable costs of operating on a transitional basis. Where appropriate, transition costs should be added to the reimbursement cap in an amount not to exceed \$50,000 per link.

BEFORE THE
Federal Communications Commission

WASHINGTON, D.C. 20554

In the Matter of)	
)	
Amendment to the Commission's)	WT Docket No. 95-157
Rules Regarding a Plan for Sharing)	
The Costs of Microwave Relocation)	

To: The Commission

PETITION FOR RECONSIDERATION
OF THE
AMERICAN PETROLEUM INSTITUTE

The American Petroleum Institute ("API"), by its attorneys, pursuant to Section 1.429 of the Rules and Regulations of the Federal Communications Commission ("Commission"), respectfully submits this Petition for Reconsideration ("Petition") of rule amendments covered by the First Report and Order ("Order") and adopted by the Commission in this matter on April 25, 1996.^{1/}

I. PETITION FOR RECONSIDERATION

1. The American Petroleum Institute ("API") enthusiastically supports the Commission's decision to permit cost sharing when more than one Personal Communications Service ("PCS") licensee benefits from the

^{1/} 61 Fed. Reg. 29679 (June 12, 1996).

relocation of a microwave link, but a single PCS licensee makes the initial payment for that relocation. API commends the Commission for adopting its cost-sharing proposal because it provides for a more equitable distribution of the relocation costs, and will facilitate systemwide relocation of incumbent microwave systems.

2. API also applauds the Commission for dismissing the unfounded allegations raised by PCS trade associations against microwave incumbents. Instead, the Commission focused on resolving the issues raised in its Notice and, in so doing, contributed to the advancement of PCS rollout and incumbent relocation. API submits this Petition for Reconsideration ("Petition") to request the Commission to fine-tune a few of its determinations so that the rules will work in a more efficient manner.

A. Conditions for Reimbursement

3. The Commission decided that a subsequent PCS licensee would be required to reimburse the PCS relocater only if (1) the subsequent PCS licensee's system would have caused co-channel interference to the link that was relocated; and (2) at least one end point of the former link was located within the subsequent PCS licensee's authorized

market area (MTA or BTA). API believes that the Commission should broaden this process to include adjacent channel interference and any subsequent PCS licensee that would have interfered with the microwave link if the link were still operational.

4. Limiting reimbursement to co-channel interference could lead to inequitable results because adjacent channel interference often presents a substantial problem. Inclusion of adjacent channel operators into the cost-sharing plan would enhance the ability of PCS relocators to recover the costs of systemwide relocations. This, in turn, could promote more broad-ranging negotiations between the relocater and a microwave incumbent.

5. Moreover, if the Commission adopts the proposal contained in its Notice to permit a microwave incumbent to self-relocate and participate in the cost-sharing plan, allowing cost recovery for adjacent channel interference would spur incumbent self-relocations. Conversely, an incumbent may be reluctant to self-relocate if it is unsure that a co-channel licensee would interfere; the presence of a cost-sharing mechanism for both co-channel and adjacent channel interference would enhance the incumbent's chances for some reimbursement.

6. The Commission permits PCS relocators that relocate a link outside of their geographic area or outside of their frequency block to obtain **full reimbursement even though the link presented adjacent channel interference.** First Order, Appendix A, at ¶ 16. The same policy should apply to all relocations. If the Commission's goal is to provide an incentive for relocation, then it should also include adjacent channel interference in the cost-sharing plan.

7. Finally, the Commission's decision to bar reimbursement for adjacent channel interference presents an anomaly vis-a-vis the unlicensed band clearinghouse, UTAM, Inc. ("UTAM"). In its plan submitted to the Commission and during public briefings, UTAM proposed to clear the estimated 10% of incumbents who are outside the unlicensed band but would experience co-channel or adjacent channel interference from the unlicensed PCS device. UTAM determined that it is important to clear those incumbents that are on adjacent channels. API believes the Commission should adopt a similar approach and enable those who relocate adjacent channel incumbents to benefit from the cost sharing plan.

B. Cost Estimates

8. The amended rules allow PCS licensees to gain access to microwave incumbents' facilities after the first year of the voluntary negotiation period so that an independent third party can estimate the cost and time needed to relocate the incumbent to comparable facilities. The PCS licensee is responsible for the costs of obtaining such an estimate. Because the one-year anniversary of the commencement of the voluntary period for A and B block PCS licensees has already passed, this provision is effective immediately. Order at ¶ 14.

9. The Commission's proposal to require independent cost estimates during the voluntary negotiation phase runs counter to the voluntary nature of this process. If incumbents are required to permit such estimates, it clearly should be during involuntary negotiations.

C. Sunset Provision

10. The Commission's decision that all microwave incumbents remaining in the frequency band 1850-1990 MHz lose their right to reimbursement either directly or via the clearinghouse on April 4, 2005 will provide a disincentive

for PCS licensees to pay to relocate microwave incumbents, particularly in later years and in rural areas. API believes that until a PCS licensee requires use of the spectrum and pays for relocation, the incumbent should retain both its primary status and its right to reimbursement. Otherwise, the Commission will create incentives for PCS licensees to delay rollout to rural areas and to forestall negotiations in subsequent years. The Commission's decision to deny incumbents reimbursement after April 4, 2005 also overlooks the fact that those incumbent systems will still be operational and that incumbents will still need to expend considerable sums of money to relocate to a reliable frequency band or other media.

D. Comparable Facilities

11. The Commission defined communications throughput as the amount of information transferred within the system in a given amount of time. During an involuntary relocation, PCS licensees will only be required to provide incumbents with enough throughput to satisfy incumbents' needs at the time of relocation; thus, PCS licensees need not match the overall capacity of the system. The capacity of the incumbent system, not the level of actual use at some point, is the crucial factor for true replacement. Under

the Commission's new rule, a microwave incumbent would be forced to accept a lower capacity system than if the definition were based on the capability of the incumbent's existing facilities.

12. API objects to this definition of throughput. No rational business would purchase a "bare minimum" system; any business that makes a significant and long-term investment in telecommunications equipment plans for the future by installing a system which will permit the business to grow into it, rather than a system which will become obsolete within a few months or years. The Commission reasoned that spectrum efficiency would be heightened by restricting throughput to existing use; this conclusion, however, is based on the incorrect premise that incumbents have only designed their systems for today's needs. The telecommunications needs of most incumbents continually expand, just as the American economy has historically expanded. Without adequate reserve capacity, replacement systems can become inadequate before installed. This necessitates a complete change-out of equipment. Under the Commission's plan, incumbents would be compelled to bear this excessive cost of future capacity even though they would have already paid for it once when the 2 GHz system was purchased. There appears to be no rational explanation

for limiting reimbursement to this inadequate and simplistic level.

E. Transaction Expenses

13. The Commission observed that incumbents are entitled to reimbursement under the amended rules for transaction expenses, such as attorneys' and consultants' fees, that are directly attributable to an involuntary relocation; however, the Commission adopted a proposal by Central Iowa Power Cooperative to place a cap of two percent of the total "hard" costs involved (e.g., costs of equipment, new towers and site acquisition). Order at ¶ 42. API points out that engineering consultants and transactional legal fees may reasonably cost \$5,000 per link for a small system in a rural area, but they might reasonably exceed \$10,000 per link in more urban areas. Other factors may increase these transaction costs. Thus, incumbents could face a potential deficiency in the reimbursement of reasonable transaction costs.

14. The Commission also determined that, once an involuntary relocation has been initiated, PCS licensees will not be required to pay for transaction expenses incurred by incumbents during the voluntary and mandatory

negotiation periods. Order at ¶ 43. API requests the Commission to reconsider the effect of this decision to forbid reimbursement of such transaction costs. In those instances when an agreement is not reached during the voluntary and mandatory negotiation periods, the Commission's decision lays the blame and cost for the failure to reach an agreement squarely upon the incumbent. API submits that it is equally plausible that the incumbent was willing to cooperate but the PCS entity was unwilling; the Commission should not relieve the PCS entity of its obligation to reimburse incumbents for the transaction costs involved with negotiating and relocating. But for the PCS licensee, the transaction costs would not have been incurred by the incumbent. API urges the Commission to permit reimbursement of an incumbent's reasonable transaction costs, regardless of when relocation occurs.

F. One Year Trial Period

15. The Commission previously established a twelve-month trial period for relocated incumbents to ensure that their new facilities were truly comparable to their former facilities. The amended rules "clarify" that the twelve-month trial period applies only where an incumbent has been relocated involuntarily. Accordingly, if the parties wish

to institute a trial period for relocations that occur during the voluntary or mandatory negotiation stage, the amended rules instruct that the parties must provide for such a period in the relocation contract.

16. API urges the Commission to apply this new stance proactively. While API is unaware of any individual occurrences, it is likely that agreements have already been reached in which the parties did not contractually reserve their right to the one-year trial period because they believed the FCC's rules guaranteed such a trial period. Retroactive application of the Commission's amended rule could deprive parties of the intended effects of their agreements.

G. Costs of Operating on a Transitional Basis

17. Many incumbents will incur costs from operating on a transitional basis during the conversion to new facilities. These costs could include expenses for leasing temporary commercial systems or costs of constructing and operating temporary facilities for use on an interim basis while the transition process occurs.

18. Because the costs of operating on a transitional basis will be significant, API submits that the cost sharing price cap should be adjusted. The Commission permits adjustment of the cap in those instances when a new tower must be constructed. Similarly, transition costs will be in addition to the costs for comparable replacement facilities and will be incurred regardless of whether the relocation is an early relocation or a later relocation. In fact, the Commission stated in its Order that:

[O]ur rules protect microwave operations by requiring PCS licensees to provide incumbents with a seamless transition from their old facilities to the replacement facilities. Thus, if providing a seamless transition requires it, PCS licensees must relocate additional links or pay for **additional costs associated with integrating the new links into the old system . . . to preserve the system's overall integrity.**

Order at ¶ 37 (emphasis added).

19. Because the transition costs of a "seamless transition" are to be paid by a PCS licensee where applicable, those costs should be added to the reimbursement cap. Specifically, the \$250,000 per link reimbursement cap for PCS licensees should be extended to include reasonable transition costs. API suggests that, where appropriate, the Commission add to the reimbursement cap an amount not to

exceed \$50,000 per link in order to compensate PCS licensees (and possibly self-relocating incumbents) for transition costs when incurred and when reasonable. In addition, the Commission should encourage the PCS licensee to judiciously expedite the cutover if the PCS licensee is responsible for replacement of equipment. If the Commission determines that the PCS licensee is not expediting the cutover in order to keep total transition costs below \$50,000, the PCS licensee should be forced to pay any excess transition costs.

II. CONCLUSION

20. API supports the Commission's decision to permit cost sharing because it will promote relocation of entire systems, or large portions thereof. By avoiding wholesale revision of existing rules, the Commission further vindicates those who relied upon the existing rules in the past and who continue to look to the Commission to protect their rights in the future. API believes that, with a few clarifications and minor changes, the Commission's decision will serve a worthy purpose for both PCS licensees and microwave incumbents.

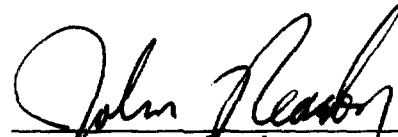
WHEREFORE, THE PREMISES CONSIDERED, the American Petroleum Institute respectfully submits the foregoing

Comments and urges the Federal Communications Commission to act in a manner fully consistent with the views expressed herein.

Respectfully submitted,

AMERICAN PETROLEUM INSTITUTE

By:

A handwritten signature in dark ink, appearing to read "John Reardon", is written over a horizontal line.

Wayne V. Black
John Reardon
Keller and Heckman, LLP
1001 G Street
Suite 500 West
Washington, D.C. 20001
(202) 434-4100

Its Attorneys

Dated: July 12, 1996